United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2662

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To be argued by
FREDERICK T. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-2662

UNITED STATES OF AMERICA,
Appellant,

—v.—

LOUIS ZAICEK,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

The United States appeals from an order filed on November 18, 1974, in the United States District Court for the Southern District of New York by the Honorable Charles M. Metzner, United States District Judge, granting the motion of Louis Zaicek to suppress the contents of an attache case as evidence, and also from the order of Judge Metzner, filed on December 10, 1974, denying the motion of the United States to rehear the motion to suppress.

Indictment 74 Cr. 802 was filed on August 12, 1974, charging Louis Zaicek with two counts of possession of stolen mail in violation of Title 18, United States Code, Section 1708. On November 6, 1974, a superseding Indictment, 74 Cr. 1036, was filed including as Counts Two and Three the charges from the prior indictment and adding as Count One a charge of transporting a stolen automobile

across a state boundary in violation of Title 18, United States Code, Section 2312.

Prior to trial, Zaicek moved to suppress as evidence against him the contents of an attache case uncovered shortly after his arrest, including the stolen mail forming the basis of Counts Two and Three of Indictment 74 Cr. 1036. On November 13, 1974, a hearing was held on this motion, and on November 18, 1974, the District Court granted the motion by order with memorandum opinion. On December 3, 1974, the United States moved for a rehearing on the suppression issue, and on December 10, 1974, Judge Metzner denied this motion by order with memorandum opinion.

Statement of Facts

Two witnesses testified for the Government at the hearing on the motion to suppress.

Investigator George Johansen of the New York State Police, who identified himself as the head of the Hawthorne Barracks Car Theft Investigation Unit (App. 14),* testified that on two occasions in December, 1972, he received reports concerning a stolen car. On the first occasion, he spoke on the telephone with a man named Martin Upmal who worked in the Vermont Motor Vehicle Department. Upmal told Johansen that a man using the name Louis Zaicek had recently attempted to register a 1972 Cadillac El Dorado in Vermont under the name, claiming that the car was a 1971 vehicle. Upmal identified the car as bearing Florida license plate 10 E 7052 and vehicle Identification Number (VIN) 6L6752Q435634. Upmal

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* References to "App." relate to page numbers of the Appendix.

also told Johansen on the telephone that he spotted the car as a 1972 model because of certain characteristics of the VIN and that Zaicek, when confronted with this inconsistency, simply left the motor vehicle department office.

Several days later, Johansen communicated by teletype with the Florida Motor Vehicle Department and received a report from the Florida state authorities that a Cadillac El Dorado with the license plate and VIN numbers reported by Upmal was registered in the name of Main Line Fleets, in Pompano Beach, Florida (App. 19).

On December 27, 1972, Investigator Johansen noticed an El Dorado Cadillac with Florida license plates 10 E 7052 parked in a driveway in Valhalla, New York. After waiting a short period of time, he observed two men get into the car and prepare to drive off. At that point, Johansen approached the driver, identified himself as a policeman, and requested the driver's operator's permit and the car registration. The driver—whom Johansen identified at the hearing as the defendant Louis Zaicek (Tr. 18)—provided Johansen with two Florida driver's licenses in his name (Exhibits 4 and 5) and a duplicate Florida registration certificate for the car (Exhibit 3), together with a copy of a leasing agreement between Main Line Fleets and LCZ Construction Company, signed by Louis Zaicek (Ex. 2). In response to Johansen's statement to him that there was a report that the car was stolen, Zaicek told Johansen that the car was rented and that if Johansen would call the rental agency from a nearby house the matter would be cleared up. Johansen accepted the invitation, called Main Line Fleets in Florida, and was told by the vice president of the company that the Cadillac had been leased to Zaicek and paid for with a series of bad checks, and that the arrest of Zaicek and the return of the car was requested (App. 27-28).

At this point Johansen arrested Zaicek, informed him of his constitutional rights under *Miranda,* and drove him to the police station in a police car, together with a passenger of the car, identified as Armenio Baddia, who was not arrested. At the same time, the car itself was seized and driven separately to the police station, where it was secured and locked; the keys were retained by Investigator Johansen (App. 29-30).

During subsequent questioning of Zaicek in the office of Investigator Johansen, Armenio Baddia approached Johansen and requested that certain of his belongings, said to be clothing, still in the Cadillac be returned to him. Johansen gave the keys of the car to two brother officers and requested that they open the car and return Mr. Baddia's belongings to him (App. 33). The officers left to do so, and returned several minutes later with a pistol and an attache case in which were found seven state bond certificates. They told Johansen that the attache case had been found in the trunk of the car and the pistol in the glove compartment. Subsequent investigation revealed the bonds to have been stolen from the mail, and these bonds formed the basis for Counts Two and Three of Indictment 74 Cr. 1036.

The second witness for the Government, Martin Upmal, testified that on December 15, 1974 a man whom he identified in court as Louis Zaicek (App. 51), came to the Vermont Motor Vehicle Department office in Montpelier and attempted to register a 1972 Cadillac El Dorado as a 1971 car. Upmal, who at the time was the head of the Department's Title and Anti-Theft Division, described how he could tell from the VIN of the car that it could not have been a 1971 model (App. 55), and that when he informed Zaicek of this, Zaicek simply left without further attempting the register of the car, leaving behind the completed registration forms (Exs. 6 and 7). Upmal also testified that he subsequently traced the car through the manufac-

turer to Main Line Fleets in Florida (App. 56) and that at some point between December 15, 1972 and Christmas, he spoke with a state police officer in New York and informed him of these events. (App. 56).

The defense called no witnesses at the hearing on the motion to suppress.

On November 18, 1974, Judge Metzner filed memorandum opinion and order granting the motion to suppress. He held that Zaicek's arrest was lawful, but that the search of the car could not be justified as incident to arrest because Zaicek had been arrested in the house. He rejected the government's argument that the search was an inventory search because, although such a search of the car would have been reasonable, the search here was not an inventory search but rather had occurred on account of Baddia's request for his clothes and that it in fact was a search of evidence. Finally, he held that the mere fact that the police had seized the Cadillac did not, in the absence of exigent circumstances not here present, dispense with the requirement of obtaining a search warrant based upon probable cause.

On December 3, 1974, the Government moved for reargument, supported by an affidavit of the Assistant United States Attorney handling the case, offering the testimony of "William MacAbee, a state policeman at the time of the search but now in private industry, [who] would be able to testify that he searched the car of Louis Zaicek on December 27, 1972, that he came upon stolen bonds when Armenio Baddia stated that he had an attache case in Zaicek's car, and that he opened the car believing it might be Baddia's." By order with memorandum opinion filed December 10, 1974, Judge Metzner denied the motion to reargue on the grounds that the Government could and should have obtained the proffered evidence before the suppression hearing.

ARGUMENT

POINT I

The search was justified since the car had been validly seized and was in the possession of the police.*

As the District Court stated both orally at the hearing on the motion to suppress (App. 63) and in the memorandum opinion filed on November 18, 1974, "[t]here is no doubt that the arrest was lawful" and based upon probable cause (App. 76), since the arresting officer had at the time of arrest. By parity of reasoning, it follows that there

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* While the Government's argument reach the merits, there appears to be a substantial question of Zaicek's standing to challenge the search here. The property seized by the police was bonds stolen from the mails, and these bonds were uncovered as a result of the search of a stolen car which Zaicek was using with the clear knowledge—established through his attempt to register it in his own name with a falsified bill of sale, even though his possession arose from a lease of the car paid with bad checks—that he had no right to possess it. Under those circumstances we submit that Zaicek lacked a justifiable expectation of privacy in the car or its contents. *United States* v. *Kucinich*, 404 F.2d 262 (6th Cir. 1968). See also *United States* v. *Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

Indeed, even if it were argued that Zaicek had a reasonable expectation of privacy in the attache case, despite the fact that it contained stolen bonds and had been placed in the trunk of a stolen car, the fact remains that he has never claimed either by way of affidavit in support of his motion or by testimony at the hearing that the attache case was his, despite the fact that such a claim could not have been used against him at trial, *Simmons* v. *United States*, 390 U.S. 377 (1968). See *Brown* v. *United States*, 411 U.S. 223, 227-230 (1973).

was probable cause to believe that the car itself was stolen and thus was subject to immediate seizure under Section 424(3) of the New York Vehicle and Traffic Law.

The evidence adduced at the hearing indicated that the car was in fact seized at the place of the arrest, driven by a police officer to the Hawthorne State Police Barracks, and secured in the presence of Investigator Johansen, who kept the keys to the car. (App. 30.)

A. The Search of the Vehicle Was Reasonable Because It Had Been Lawfully Seized by the Police.

Since, as noted, the police had seized the Cadillac on an ample demonstration of probable cause to believe that it was stolen and on the basis of a state statute specifically authorizing such a seizure, this is *not* a case in which the police took temporary custody of an automobile as a convenience to its rightful possessor or in order to protect the civil order of the public highways. *E.g., Cady* v. *Dombrowski,* 413 U.S. 433 (1973). *Dyke* v. *Taylor Implement Mfg. Co.,* 391 U.S. 216, 221 (1968); *Preston* v. *United States,* 376 U.S. 364 (1964); *cf. People* v. *Sullivan,* 29 N.Y. 2d 69, 323 N.Y.S. 2d 945 (1971). Here, the police had properly seized and impounded the Cadillac as stolen property. It follows that they were entitled to search it without a warrant or probable cause as to its contents and without a showing of "exigent circumstances" even if, as Judge Metzner found, the search was for evidence of a crime. *Cooper* v. *California,* 386 U.S. 58 (1967);* *United States* v. *Capra,*

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* The District Court (Op. 5) cited *Cooper* for the proposition that "lawful custody of an automobile does not of itself dispense with constitutional requirements of searches thereafter made of it . . .," quoting from 386 U.S. at 61. This quotation must be seen in context. It briefly proceeds the language, quoted above in this brief, that it would be "unreasonable" to bar police

[Footnote continued on following page]

501 F.2d 267, 280 (2d Cir. 1974), *affirming* 372 F. Supp. 600 (S.D.N.Y. 1973); *United States* v. *Ortega*, 471 F.2d 1350 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970); *United States* v. *Ayers*, 426 F.2d 524 (2d Cir.), *cert. denied*, 400 U.S. 842 (1970); *United States* v. *Francolino*, 367 F.2d 1013, 1018-1023 (2d Cir. 1966), *cert. denied*, 386 U.S. 960 (1967); *cf. United States* v. *Mazzochi*, 424 F.2d 49 (2d Cir. 1970). See also *United States* v. *Young*, 456 F.2d 872 (8th Cir. 1972); *United States* v. *Edge*, 444 F.2d 1372, 1375 (7th Cir.), *cert. denied*, 404 U.S. 855 (1971); *Davida* v. *United States*, 422 F.2d 858 (10th Cir.), *cert. denied*, 400 U.S. 821 (1970).* While the cases cited involve the searches of vehicles impounded for forfeiture because they have been used to transport contraband, it seems beyond argument

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from searching a car "for their own protection". *Id.* 61-62. Thus, the Supreme Court meant nothing other than there must be something more than mere *custody*—which may occur for a variety of reasons and for a brief length of time—to justify a search. *See, e.g., Dyke* v. *Taylor Implement Mfg. Co.*, 391 U.S. 216, 221 (1968): "[T]here is no indication that the police had purported to impound or to hold the car, that they were authorized by any state law to do so, or that their search of the car was intended to implement the purpose of such custody. Here the police seem to have parked the car near the courthouse merely as a convenience to the owner . . .". See also *Preston* v. *United States*, 376 U.S. 364 (1964), *United States* v. *Squires*, 456 F.2d 967 (2d Cir. 1972).

Since here the record establishes that the police had in fact impounded the car, intended to keep the car indefinitely in their possession, and were entitled to do so under state law, it follows that the precise *holding* of *Cooper*—that a search under such circumstances is permissible—is directly apposite to this case.

* Indeed, this distinction is recognized in the very portion of the Court's opinion in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 461-462 (1971) upon which the District Court in this case relied (Op. 5). In any event, as Judge Friendly has noted with reference to *Coolidge*, "[i]n view of the plethora of opinions, it is hard to see how . . . this frequently cited case stands for anything except that Coolidge's conviction was reversed." *United States* v. *Santana*, 485 F.2d 365, 369-379 n. 8 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

from the reliance on *Boyd* v. *United States,* 116 U.S. 616 (1886), in *United States* v. *Francolino, supra,* 367 F.2d at 1018-1019, that the powers of the Government in dealing with forfeitable vehicles are, if anything, more restricted than its power over stolen vehicles. In this case the police were dealing not with an automobile whose lawful possessor had forfeited his legal right to the automobile by putting it to a statutorily impermissible use but rather with an automobile taken from a man who had no legal right to possess it at all.

B. Inventory Search

Quite apart from the foregoing reasons, sufficient of themselves to permit the search, the search below was justified as an inventory measure. Investigator Johansen, the head of the Troop K Auto Theft Investigation Unit, testified that it is the normal procedure of his unit to conduct a thorough search of impounded vehicles. The purposes of these searches, he stated, are to insure that the police know exactly what is in the car in order to defend against subsequent claims, and also to separate accessories of the car, such as a removable tape deck or radio, that must be returned to the true owner, in this case the Main Line Fleets renting agency, from property that might belong to someone other than the owner of the car. (App. 31-32.) It is settled that when police have valid custody and control of a car they have the right—and indeed the duty—to determine the contents of the car for purposes of protecting those contents during the period the car is in custody and of guarding against subsequent claims against them. This rationale is applicable not only when the car has come into the possession of the police because of criminal activity of the owner or possessor, see *Harris* v. *United States,* 390 U.S. 234 (1968), but also when the police come into custody of the car through performance of non-criminal, housekeeping functions. *Cady* v. *Dombrowski, supra.*

In *Cady* v. *Dombrowski, supra,* the police towed a disabled car from the scene of an accident to a service station and left it there. A subsequent search of the car then revealed evidence later used at trial against the owner of the vehicle. Relying on *Harris* and *Cooper,* the Supreme Court concluded that the "type of caretaking 'search' conducted here of a vehicle that was neither in the custody nor on the premises of its owner and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained".* *Id.* at 447-448.

The propriety of the search of this car follows *a fortiori* under these principles. Here, the police clearly had the strongest possible need and duty to be aware of the contents of the car—it was to be in their custody for an indefinite period of time until it could be returned to its true owner and could have contained dangerous, stolen or contraband

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* In its opinion, the District Court disposed of *Cady* in one sentence: "In *Cady* v. *Dombrowski,* 413 U.S. 433 (1973), there was probable cause to believe that the gun was in the car." (Op. 5)

This statement is mystifying. While the Court did note that the searching officer "reasonably believed" that the car might contain a gun, 413 U.S. at 448, this finding was significant only because it justified application of the "standard procedure" of the police to keep police weapons out of non-police hands, see *id.* at 443. But "reasonable belief" that a policy is applicable is hardly identical with "probable cause" in the sense that that term is used in the Fourth Amendment, and it is clear that the *Cady* court did not so intend. Rather, the court stated, "We believe that the instant case is controlled by principles that may be extrapolated from *Harris* v. *United States, supra,* and *Cooper* v. *California, supra*". *Id.* at 444-445. Since neither of the cited cases involved probable cause, the propriety of the search must of necessity have been based on the two facts found to "deserve emphasis" (*id.* at 442): that the police "exercised a form of custody or control" over the vehicle and that it was "standard procedure" to find and retain police weapons.

materials that the police would otherwise unwittingly be required to harbor or transfer, under the circumstances, an inventory search was clearly valid. *United States* v. *Kelehar,* 470 F.2d 176 (5th Cir. 1972); *United States* v. *Rosenberg,* 458 F.2d 1183, 1185 (5th Cir.), *cert. denied,* 409 U.S. 868 (1972); *United States* v. *Mitchell,* 458 F.2d 960, 962-963 (9th Cir. 1972); *United States* v. *Pennington,* 441 F.2d 249, 250-252 (5th Cir.), *cert. denied,* 404 U.S. 854 (1971); *United States* v. *Lipscomb,* 435 F.2d 795 (5th Cir. 1970), *cert. denied,* 401 U.S. 980 (19); *People* v. *Sullivan, supra.*

The District Court, although apparently in agreement with the proposition that an inventory search is reasonable under the Fourth Amendment (App. 77-78), nonetheless found the search to be improper because, despite the routine practice of Car Theft Investigation unit in making inventory searches of seized vehicles, a practice the District Court recognized and found to have been later followed here, the officers actually finding the attache case, were not, as a *subjective* matter, conducting a formal inventory search, but rather had found the bonds in the course of looking for property belonging to the passenger Baddia.*

Because of the unavailability of the officers actually finding the attache case to testify at the hearing, the District Court could not make any positive finding as to the actual

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* The opinion of the District Court also noted that the report prepared by the arresting officer justified the search as being incident to a lawful arrest. This contemporaneous characterization by a police officer does not, of course, bar the Government from basing the propriety of the search on another and different theory. As one judge has stated, "On this subject of automobile searches, which has not produced a simple and symmetrical jurisprudence, it may not be astonishing that law enforcement officers and counsel lack neat or entirely consistent theories." *United States* v. *Capra, supra,* 372 F. Supp. at 602.

subject intent or motivation of those men.* But what ever their motivation, it is clear that in terms of actual scope—that is, in terms of the actual physical dimensions of the search—the officers were at all times acting within the bounds of the inventory rationale. At no time did they see or take anything that they could not have seen or taken in the course of a formal inventory search.

This being true, it follows that the lack of a positive showing of a subjective motivation specifically directed to the inventory search rationale is meaningless. By claiming that the police should be expected to state not only the facts underlying a search but also the subjective reasons motivating it, the District Court failed to take account of the recent holding of the Supreme Court in *United States* v. *Robinson*, 414 U.S. 218 (1973). In that case, the defendant Robinson was searched incident to an arrest for a traffic violation, and during the search a small quantity of drugs was found. Those drugs were admitted into evidence against him, and he was subsequently convicted of a narcotics violation. On an initial appeal to the United States Court of Appeals for the District of Columbia Circuit, that Court sent the case back to the District Court for a further hearing on the motion to suppress the drugs in order to determine the arresting officer's subjective intent in conducting the search. 447 F.2d 1215 (D.C. Cir. 1971) (*en banc*). At the hearing on remand, the arresting officer stated that he did not search because he felt that Robinson might have a weapon, nor because of any thought that he might find evidence of the crime for which Robinson was arrested. Rather, "I just searched him." *United States* v. *Robinson*, 471 F.2d 1082, 1089 (D.C. Cir. 1972) (*en banc*). The District Court again ruled the drugs to be admissible.

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* The statement (Op. 4) that the search was a "fishing expedition" has no positive support in the record and could only be mere speculation.

On a second appeal, the Court of Appeals, sitting *en banc*, reversed and ordered the drugs suppressed as evidence, reasoning that since the officer explicitly stated that neither of the articulated grounds for search incident to arrest—an attempt to find weapons and destructible evidence—motivated him at the time of the search, then no "exigency" excepting the situation from the warrant requirement was presented.* On writ of certiorari, the Supreme Court reversed, holding that since the search was in fact incident to the arrest, the officer's subjective motivation was irrelevant.**

The holding and logic of *Robinson* are both applicable and controlling in this case. Since the validity of a search depends upon the *facts* underlying the search and not the motivation of the officers, the absence of evidence of the officers' specific intent is without consequence. Indeed, the holding in *Robinson* in this respect is considerably more extensive than necessary to reach a similar disposition here. In *Robinson* the Court held that it was unnecessary that the purposes and scope of a search incident to arrest be consistent with the legal rationales underlying the right to make it, so long as the legal condition precedent for the search—custody based on probable cause—existed. Thus, the decision of the District Court is even less justifiable than that of the Court of Appeals in *Robinson*, subsequently reversed by the Supreme Court; the decision here does not limit the *scope* of the search but only its *timing*, since it is clear, and tacitly accepted by the District Court, that a sub-

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* Interestingly, the Court did recognize the existence of doctrine authorizing searches of automobiles, believed with probable cause to be stolen, for evidence of ownership and identity. *Id.* at 1104 n. 38.

** The Court noted: "Since it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the searching officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that [the defendant] was armed." 414 U.S. at 236. (Footnotes omitted.)

sequent inventory search would have been proper. See *United States* v. *Riggs*, 474 F.2d 699, 704 (2d Cir.), *cert. denied*, 414 U.S. 820 (1973). While the appellate decision in *Robinson* at least had the arguable merit of protecting Fourth Amendment values through limitation on the intrusiveness of a search, the decision of the District Court in this case would produce only a needless charade designed to postpone rather than limit the search.*

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* Although neither the defendant nor the District Court relied on it, certain language in this Court's decision in *United States* v. *Capra*, *supra* might at first blush appear to support the reasoning of the District Court in this aspect of case. In *Capra*, police officers arrested a defendant while the defendant was driving a car in New York. They immediately took the car to a nearby sanitation department garage and proceeded to search the car, in the course of which certain incriminating evidence was found. The District Court allowed this evidence to be admitted at trial, and the Court of Appeals affirmed. In the course of doing so, however, the Court noted:

> "The Government contended at the hearing that this was a routine inventory search for the protection of the defendant's property, but the trial Court properly rejected that argument because, even though the police may have 'exercised a form of custody or control' over the car, they clearly conducted the search for the purpose of securing incriminating evidence." 501 F.2d at 280.

This statement cannot be considered to be binding upon the present case. First, the statement was dictum, since the Court decided on other, independent grounds that the search was permissible, and thus its comments on inventory search were wholly unnecessary to the result. Second, the significance of the *Robinson* decision is nowhere mentioned in the briefs in that case, and appears not to have been brought to the attention of the court. Finally, and most importantly, the case is factually dissimilar in important respects. The search in *Capra* was made immediately after the arrest (and indeed as part of the "arrest proceedings" (see id., at 279), and essentially took place "in the field." Here, by contrast, the police had formally seized the car, driven it back to police headquarters, and placed it under lock and key in their possession and custody. Thus, in this case but not in *Capra* all the predicates of an inventory search had been established, and thus the subsequent search can logically be justified on the inventory rationale.

In any event, even if the District Court's conclusion from its finding of subjective intent were warranted, it is clear that the stolen bonds should not have been suppressed. At the end of his testimony, Investigator Johansen stated that subsequent to the discovery of the attache case he "personally inventoried" "the entire contents of the car . . ." (App. 47), and Judge Metzner so found (App. 78). It is thus clear from the hearing that if the bonds had not been discovered at the time of the initial entry into the car by the police they would inevitably have been found during the later, more thorough search based formally on the need to inventory. Since, as stated above, this search would have been deemed permissible even under the decision of the District Court itself (App. 77-78), the unreasonableness of the rule advanced by the District Court becomes manifest. Since the discovery of the stolen bonds in the attache case would inevitably have occurred in a manner consistent with the requirements of the Fourth Amendment as interpreted by the District Court, it follows that the initial search did not infringe any of Zaicek's Fourth Amendment rights. As this Court has stated in the context of the Fourth Amendment, "Conduct is not a legal cause of an event if the event would have occurred without it". *United States* v. *Cole,* 463 F.2d 163, 173 (2d Cir.), *cert. denied,* 409 U.S. 942 (1972) (Friendly, *J.*). See also *United States* v. *Falley,* 489 F.2d 33, 40-41 (2d Cir. 1973). Since the discovery of the bonds "would have occurred without" the initial search actually made, it follows that the actions of the police officers—although clearly permissible under the other arguments made in this brief—were nonetheless not the legal causes of the discovery. Thus, even if the District Court correctly based the impropriety of the initial search on the subjective motivation of the officers, the "legal cause" for the discovery was incorrectly ascribed to that initial search, and suppression on that basis was wrong.

POINT II

The search of the car was based upon probable cause and upon a recognized exception to the warrant requirement.

A. The Police Had Probable Cause To Search The Car At the Time Of The Arrest.

At the time of the arrest—and indeed at the time of their original contact with Zaicek when he was seen to enter the car—the police officers had probable cause to believe that the Cadillac was a stolen car and that Zaicek was the thief. Given this probable cause, "[t]he search of the car was compelling under the circumstances and was fully justified not only to find any instruments of the indicated crime but also any evidence pertaining to a crime, such as title papers, ownership, use and possession of the car." *United States* v. *Jackson,* 429 F.2d 1368, 1372 (7th Cir. 1970) (Mr. Justice Clark); *United States* v. *Faulkner,* 488 F.2d 328 (5th Cir. 1974). At the time of the arrest the police knew of Zaicek's lease of the car with bad checks and his attempt to register it in Vermont with a phony bill of sale. There was a clear probability that documents relating to these activities would be in the car, and an attache case was clearly an appropriate place for them. Its search was therefore fully warranted.

B. No warrant was necessary to search the car.

The courts have long recognized that searches of cars present problems distinct from searches of homes, places of business or other locations that are not themselves capable of being moved. The Supreme Court noted in *Carroll* v. *United States,* 267 U.S. 132 (1925) that a warrant is not required "where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must

be sought." *Id.* at 153. This was precisely the situation that confronted Investigator Johansen at the time of Zaicek's arrest: even though Zaicek was himself in custody, the car itself was still fully mobile and could have been moved out of the jurisdiction by Mr. Baddia or by anyone else with access to the keys. See *Cardwell* v. *Lewis*, 417 U.S. 583 (1974); *United States* v. *Jenkins*, 496 F.2d 57, 73 (2d Cir. 1974).

C. The later search at the police headquarters was justified by the demonstration of probable cause at the time of arrest.

The fact that the search occurred at the station house, when the car was in police custody, and not immediately at the time of arrest, did not deprive the police of the right to rely on the *Carroll* rationale. The decision in *Chambers* v. *Maroney*, 399 U.S. 42 (1970) is squarely on point. In that case, the occupants of a car were arrested on a robbery charge. The car was then driven to the police station, and a thorough search revealed incriminating evidence concealed in the vehicle under the dashboard. The Court dismissed the argument that the car should have been immobilized until a warrant could be sought, concluding that since the search was justified at the time of arrest it was still valid even though made at a later point. As the Court later stated in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 463 n. 20 (1971), "*given* a justified initial intrusion, there is little difference between a search on the open highway and a later search at the station." See also *United States* v. *Ellis*, 461 F.2d 962, 965-967 (2d Cir. 1972), *cert. denied*, 409 U.S. 866 (1972); *United States* v. *Carneglia*, 468 F.2d 1084, 1089-90 (2d Cir. 1972), *cert. denied*, 410 U.S. 945 (1973). *Cf. United States* v. *Edwards*, 415 U.S. 800, 801 (1974). It follows that the search of the car at the station house was valid independently of the argument in Point I since it was based upon probable cause.

POINT III

The District Court improperly denied the motion of the Government for rehearing of the suppression motion.

Following the entry of the order suppressing the contents of the attache case, the Government moved for rehearing on an affidavit of the Assistant U.S. Attorney stating that one of the police officers actually conducting the search, William MacAbee, who had been located since the November 13 hearing working in a bank, would testify that he discovered the attache case and the contents when looking for Baddia's property. In particular, he would testify that Baddia stated that he had an attache case, and that MacAbee saw and opened the attache case upon this representation. (App. 82-83).

It is clear, then, that had MacAbee been permitted to testify to the facts he has asserted on reargument, the search should have been upheld even if the District Court had made a subjective inquiry into his intent and still found that the search had not been an inventory search. Since Baddia had not been arrested and was in no way implicated in the crime for which Zaicek was arrested, the police were under an obligation to remove his property from the car and return it to him. *United States* v. *Birrell,* 470 F.2d 113 (2d Cir. 1973). Thus, since the police were clearly acting entirely reasonably and properly in looking for Baddia's property, they were entitled, during an examination of the contents of the trunks of the Cadillac for that purpose, to seize such evidence of criminal activity as came into plain view, even if their possession of the vehicle had arisen from the temporary custody as an accommodation for the owner, as in *Dyke,* and not from its seizure as stolen property or contraband. See *Cady* v. *Dombrowski, supra; Harris* v. *United States, supra; United States* v. *Sifuentes,* 504 F.2d 845 (4th Cir. 1974); *cf. United States* v. *Prazak,* 500 F.2d 1216 (9th Cir. 1974).

Under these circumstances, we respectfully submit that Judge Metzner abused his discretion in refusing to reconsider the motion after hearing MacAbee's testimony. While concededly the Government would have been well advised to have had MacAbee located, debriefed and available to testify by the time the motion was heard, we respectfully submit that the effect of the trial judge's refusal to reopen the matter was an unwarranted penalty for this error. The exclusionary rule is intended to deter police misconduct by foreclosing the use of its fruits. But, as this Court has recently had occasion to suggest, *United States* v. *Artieri,* 491 F.2d 440, 446-447 (2d Cir. 1974), needless application of the exclusionary rule may only serve to argument "a growing disillusionment with the effectiveness and usefulness of the . . . rule." In this particular case, the suppression of the stolen bonds will not only apply serious sanctions where, we submit, there was no police misconduct, but it will also foreclose the prosecution of a serious criminal offense. Whatever the Government's failings, their cause and effect do not warrant a result so adverse to the public interest.

CONCLUSION

The order of the District Court should be reversed.

Respectfully submitted,

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FREDERICK T. DAVIS,
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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Frederick T. Davis being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 20 day of January 1975 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Vincent W. Lenna, Esq.
50 Riverside Ave
Yonkers N.Y.
10701

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Frederick T. Davis

Sworn to before me this
20 day of January, 1975

Gloria Calabrese

GLORIA CALABRESE
Notary Public, State of New York
No. 24-0535340
Qualified in Kings County
Commission Expires March 30, 1975